the 8 day of October 03 350
TESTE: LILLIE M. HART, CLERK
By _____ D.C.

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF CHESAPEAKE

COMMONWEALTH OF VIRGINIA,	
v.	
LEE BOYD MALVO,	Case No. 102888 The Hon. Jane Marum Roush
Defendant.	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS INDICTMENT DUE TO UNCONSTITUTIONALITY OF VA. CODE § 18.2-31(13)

COMES NOW, Defendant, Lee Boyd Malvo, by and through undersigned counsel, and in support of his Motion to Dismiss the Indictment against him based upon Va. Code § 18.2-31(13) on the grounds that said statute violates both the United States and Virginia Constitutions, hereby states the following:

FACTS

Defendant is one of two individuals accused of participating in what have become known as the "Sniper Shootings". He is specifically charged with capital murder under both Va. Code § 18.2-31(8) and (13) for the shooting death of Linda Franklin, which occurred in the parking lot of Home Depot on Rte. 50 in Falls Church, Virginia on October 14, 2003. This shooting is one of many which have *collectively* been theorized to have a purpose fitting within the verbiage of the newly-drafted and as yet untested "Terrorism Statute", § 18.2-31(13) in conjunction with § 18.2-46.4.

Mr. Malvo is charged in his indictment with killing Linda Franklin in order to either "intimidate the civilian population at large" or to "influence the conduct or activities of the

government of the United States, a state or locality through intimidation".[1] Va. Code § 18.2-46.4, Definitions.

LEGISLATIVE HISTORY

The history of the Terrorism Statute begins on September 11, 2001 at approximately 9:00 a.m., when three airplanes were purposely crashed into the World Trade Center in New York and the Pentagon here in Northern Virginia. These "missions" were flown by a number of men associated with "Al-Qaeda" -- a militant Islamic, and *anti-American* organization "headed" by known terrorist Osama Bin-Laden. Mr. Bin-Laden was recorded both before and after these attacks stating his desire to destroy the United States, and his pleasure with the "success" of the attacks: "There is America, hit by God in one of its softest spots. Its greatest buildings were destroyed, thank God for that. . . When God blessed one of the groups of Islam, vanguards of Islam, they destroyed America." http://www.newsmax.com/archives/articles/2001/10/8/84151.shtml, Translation of Speech by Osama Bin Laden, October 8, 2001.

In response to the attacks and continued threat from Al-Qaeda and other such organizations throughout the world, Virginia and other states passed statutes clearly aimed at the kinds of activity that occurred on September 11th. These statutes were passed in record time with very little debate, veritably *no challenge*, and few, if any, revisions from their original drafts. The legislative history of these statutes, therefore, is September 11th itself, the collective reaction of America. To know what the intent behind the statute was, one need only look to the emotional speeches given by political leaders as legislatures scrambled to fashion some semblance of protection for their constituency.

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[1] The Commonwealth has repeatedly stated on the record that the allegation will be the latter, referring to the government, not the civilian population at large.

In January 2002, Virginia's Attorney General, Jerry Kilgore, stated that

> [W]e find ourselves at war abroad and with a never-before experienced threat of attack here at home. We stand on soil – Virginia soil – that has been successfully attacked by a foreign tyranny. It is necessary that we strengthen our laws and commit ourselves to joining the national fight against terrorism. Evil masterminds will find no safe haven in Virginia.

Jerry Kilgore, Press Release January 16, 2002, Attorney General Announces 2002 Legislative Agenda, available at www.vaag.com. The "The Terrorism Statute" or "the statute" as Va. Code § 18-31(13) shall be referred to herein, renders capital "[t]he willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in § 18.2-46.4". "Terrorism" is not defined. "Act of terrorism," however, is defined as "an act of violence as defined in clause (i) of subdivision A of § 19.2-297.1 committed with the intent to (i) intimidate the civilian population at large; or (ii) influence the conduct or activities of the government of the United States, a state or locality through intimidation." Va. Code § 18.2-46.4.

I. Virginia Code 18.2-31(13) Violates the Eighth and First Amendments of the United States Constitution, Facially and As Applied

The 8th Amendment of the Constitution of the United States prohibits "cruel and unusual punishment." A parallel prohibition is found in Article 1, § 9 of the Virginia Constitution. A punishment that is excessive -- i.e. "does not fit the crime" can be considered cruel and unusual. There must be proportionality between the crime committed, the culpability of the actor, and punishment. Thus, a punishment may be deemed cruel and unusual if it is considered too severe for the crime, see, e.g., Gregg v. Georgia, 433 U.S. 584 (1977) (death penalty too excessive a punishment for rape); or because the defendant's relative culpability does not warrant execution, see, e.g., Atkins v. Virginia, 536 U.S. 34 (2002) (it is cruel and unusual to execute mentally retarded defendants); or because the manner and means of punishment themselves shock the

conscience and are themselves cruel and unusual, " . . . namely, such bodily punishments as involve torture or lingering death, such as are inhumane and barbarous, as for example, punishment by the rack, by drawing and quartering, leaving the body hung in chains, or on the gibbet, exposed to public view, and the like." Hart v. Commonwealth, 131 Va. 726, 741, 109 S.E. 582, 587 (1921).

Despite many challenges on Eight Amendment grounds, it has been held that the Virginia death penalty itself is not cruel and unusual punishment on its face or as applied. See, e.g., Yarbrough v. Commonwealth, 258 Va. 347, 360 n.2, 519 S.E. 2d 602, 607 n.2 (1999); Jackson v. Commonwealth, 255 Va. 625, 635, 499 S.E. 2d 538, 545 (1998); Goins v. Commonwealth, 251 Va. 442, 453, 470 S.E. 2d 114, 122, cert. denied, 519 U.S. 887 (1996) (all as to drafting, legal application); see also, Ramdass v. Commonwealth, 246 Va. 413, 419, 437 S.E. 2d 566, 569 (1993) (electrocution is not cruel and unusual punishment).

Defendant submits, however, that the Terrorism Statute is unconstitutional in that it permits excessive and therefore cruel and unusual punishment in certain circumstances. On its face, the statute is devoid of clarity. The vague definitional foundation – with *no* definition of the word "terrorism" itself -- on which the statute relies to justify execution is rife with overbroad, non-specific terms. The statute clearly, as this case illustrates, can encompass situations which were not remotely anticipated by the legislature – even cases which the legislature *previously* took care to *exclude* from capital consideration. The punishment in such instances is disproportionate to the crime. The *application* of the statute, permitting execution of principles in the second degree, likewise leads to punishment disproportional to culpability.

Finally, the court must note that under the current statutory scheme, a crime may be capital or not, and even a more *heinous* crime may not be, *depending solely on the actor's*

motive. More importantly, the motive that is punished more harshly can be, and *is* in this case, a desire to change or influence government policy and/or behavior. Commission of the same offense for money, power, "turf", fun, excitement, revenge or other reasons suffers lesser exposure. The irony that this nation was founded and shaped by constant efforts – sometimes violent, in fact – to influence and change government policy and behavior, is glaring.

Irony aside, imposing harsher penalties upon motive is logically problematic and difficult, if not impossible, to justify under our current system of state and federal law. Furthermore, imposing harsher penalties *specifically* upon those who act with an aim to influence or change the government, while not a *direct* restraint on free speech, certainly more than implicates both the First Amendment as well as the Equal Protection Clause of the Constitution. Defendant submits that, in fact, disproportionate sentences based upon "anti-government" or "anti-policy" motives do in fact *violate* both clauses. The former as the otherwise constitutionally protected anti-government notions held by the defendant are *themselves* punished by this scheme, and the latter as one who attempts to, for example, extort money from a private, even *indigent* private citizen would presumably face a lesser penalty than one who in performing the *same act* seeks to dip into the government's coffers.

A. *The Statute on Its Face*

i. The definition of "act of terrorism" is vague and overbroad. To allow said definition to govern the determination of individual motives, to be the foundation and justification of the imposition of the death penalty is to permit cruel and unusual punishment.

While § 18.2-31(13) seemingly narrows the field of offenses that may be subject to the death penalty, the cornerstone of the statute is § 18-2-46.4, which provides the undefined phrases including "civilian population at large," "conduct of activities," and "locality." These are vague terms as there are a myriad of groups, acts and places that could be placed in each

category, respectively, there are likewise arguments to be made that *every* crime of violence is so motivated. As an example, the term "locality" can include neighborhood, county, district, parish, etc.. While undefined, it is explicitly distinguished from "the United States" and "a state" and as the three are listed in order of size – largest to smallest – we are left with all possible subdivisions of a state *as well as all subdivisions thereof* that have "government". City councilman, county executives, town hall staff, court clerks, parking enforcement, etc. can all theoretically be considered members of the government of a locality.

"Conduct or activities" is also undefined, leaving open everything from the passage of federal legislation to the itinerary of a county fair. "Civilian population at large" assumedly relates to the locality, which again causes a similar definitional problem.

Lest the Court find these examples to be illogical or unlikely, the instant case in and of itself is an illustration of the vagueness of the statute. As those responsible for the passage of the "Terrorism Statute" have acknowledged, the law was passed directly in response to September 11 (an attack by an international anti-American organization, utilizing commercial aircraft upon major cities and government buildings, in an effort to influence the United States government to, in the basest terms, surrender all interests and remove itself from the Middle East) and "lawmakers did not necessarily conceive it as applying to this sort of case." Chris Wilson, Virginia: Sniper Trials to Test Virginia Terrorism Law, U-Wire, December 2, 2002. (quoting Randy Davis, spokesperson for Virginia Attorney General Kilgore). That the statute admittedly extends beyond its intended reach – to cases *not conceived* by the legislature – is an explicit statement that its terms are vague and its reach is overbroad. It is therefore not only an inappropriate foundation for the imposition of the death penalty, but is unconstitutional on its face.

. The fact that the statute can be molded around the facts of this case, fitting passably, does *not* cure the constitutional defect inherent in the statute and renders its application in *any* case unconstitutional.

ii. The use of a particular motive as a distinguishing, nay *aggravating* factor, to warrant execution dictates the ultimate punishment in spite of our rights under the First and Fourteenth Amendments, and is therefore cruel and unusual.

The Fourteenth Amendment provides Equal Protection under the law. Those similarly situated are not to receive disparate treatment. The statute creates a situation wherein one's motivation, which, given the broad nature of the statute may range from international policy and an animus toward our entire nation to a local sheriff's election, can be the one distinguishing factor which gives rise to the death penalty. A desire to influence government – which is protected under the First Amendment – can now, if accompanied by an otherwise "standard" homicide, be deemed terrorism. As the example below illustrates, accomplices to crimes, if they act out of dissension, are eligible for greater punishment than principals in the first degree, committing the same crime, provided it can in no way be fit into the broad, vague categories provide by the statute. This is precisely what the Equal Protection clause is designed to prevent.

B. *The Statute As Applied*

Va. Code § 18.2-31(13) allows for imposition of the death penalty whether or not the defendant is the actual "triggerman." It therefore allows for a punishment in excess of the crime committed and excessive relative to the Defendant's culpability. Clearly, the Commonwealth has long deemed death an appropriate penalty for the intentional killing of another. With Va. Code § 18.2-18 (2003), the Commonwealth has extended the penalty's application to the person soliciting the murder in situations of murder for hire and murder at the direction of another, as clearly, *that* individual has acted to intentionally, willfully and with premeditation, bring about

the death of another. It can be argued that in those situations, the person hiring the actual killer or directing the actual killer is culpable for all elements of the offense of murder, and the hiring or direction is equally a "but for" cause of the victim's death as the bullet, knife, or other method of killing.

That argument cannot be made with regard to including the accessory or principal in the second degree as subject to death for violations of § 18.2-31(13), as the person who does not perform the act of killing has not performed an act that "but for" caused the death of the victim. In addition, as the statute includes a motive element (to influence the government or intimidate the public at large), an accessory may be punished where he did not commit a murder, but assisted in some minor way – driving a vehicle, keeping watch, or other "aiding and abetting" kind of activity – based upon his or her political beliefs. What follows is that an accessory to such an act is subjected to the death penalty by the distinguishing characteristic of personal, political, religious, or other beliefs that might lead one to want to influence the government or intimidate the public.

The unequal treatment of those similarly situated based purely on the intended symbolism of the offense is a borderline violation of the First Amendment but more clearly, punishing *accessories* to the offense more harshly only where the motivation is anti-America, anti-government, anti-mainstream, provides for a penalty far outweighing that person's culpability in the actual murder, which is cruel and unusual. As for First Amendment concerns, the Supreme Court has stated in Virginia v. Black, 123 S.Ct. 1536, 1549-50 (2002)[2] that the

[2] "The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages in light of cross burning's long and pernicious history as a signal of impending violence. Thus, just as a State may regulate only that obscenity which is the most obscene due to its prurient content, so too may a State choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm. A ban on cross burning carried out with the intent to intimidate is fully consistent with our holding in *R. A. V.* and is proscribable under the First Amendment."

intent behind an offense – specifically cross-burning -- has been held constitutional. But, it cannot be ignored that the opinion is specific." The question remains whether the Court's opinion in Black is based upon a general approval of punishing intent, or upon the decades of effort made by the Supreme Court to combat racial discord domestically, and further, whether the expression of racial hatred has ever been found to hold any value by the Court. Is not political dissension valued more highly and should it therefore be the distinguishing factor in a *capital* offense? Defendant submits it should not.

While it may appear to be an oversimplification, or perhaps an exaggeration, to state that similarly situated defendants would be treated differently purely based on the intended expression, or even less, an example will illustrate the true logic of the statement:

As the law in Virginia stands today, after the passage of § 18.2-31, a drug dealer who shoots a rival drug dealer not only to eliminate the competition but to establish his role of power in his community *would not* automatically be subject to or even eligible for the death penalty. However, a woman who drives her husband, a political subversive, to a demonstration where she is aware that he will kill someone in order to make a statement regarding the United States' position in the Middle East, would be subject to death. Thus, it is not the Defendant's actions, but her thoughts, perhaps even merely her allegiance to her husband, that leads her to the electric chair.[3]

i. The true, intended definition of "terrorism", which is implied by the definition of "weapon of terrorism" in § 18.2-46.4, makes clear that the collective "Terrorism Statute" is inapplicable to this case.

[3] Given the lack of case law based upon this statute, it is not clear whether the "terrorist" motive, as defined in Va. Code § 18.2-46.2 is imputed to the accessory. The execution of the principal in the second degree where even the *motivation* is only attributable to the actual "triggerman" is, as there is not prohibition thereon, appears to be a possibility under the statute as currently written, and should the court(s) deem that to in fact be the case, the violative nature of the statute is twofold, as persons can then be executed where they do not commit a murder and do not themselves possess the distinguishing and aggravating characteristic of a motivation to influence government or intimidate the public.

Despite the legislature's limited consideration and debate over the proper wording and application of these statutes, the intent, the *targeted activity* is made clear by the definition of "weapon of terrorism" in § 18.2-46.4. No other murder statute includes a definition of the kinds of weapons which may be used, no such limits exist elsewhere. Defendant submits that the limiting definitions of "weapons of terrorism" place limits upon the phrase "act of terrorism" by indicating the intended definition of terrorism. Logically and more simply, if an "act of terrorism" is to be committed, and that "act" is an "act of violence", then it would involve a weapon. Generally speaking, weapons can be varied, and in fact *anything* can be used as a weapon. However, in the instance of *terrorism* the legislature *did not leave this open*, and its inclusion of a specific category of weapons that are "weapons of terrorism" not only indicates what the statute *overall* is aimed at, but what, in fact, terrorism and more narrowly an "act of terrorism" truly is.[4]

The definition of "weapon of terrorism" is "any device or material that is designed, intended or used to cause death, bodily injury or serious bodily harm, through the release, dissemination, or impact of (i) poisonous chemicals; (ii) an infectious biological substance; or (iii) release of radiation or radioactivity." Cleary this definition includes bombs and biological weapons such as anthrax, and includes not only dissemination but "impact". The direct link to the events of September 11 and immediately thereafter is *obvious*, as is the legislature's definition of "terrorism" which is blatantly absent from the "Terrorism Statute". It is illogical to

[4] Further guidance is provided by the FBI's definition of "terrorism," which is far more intuitive and would appear to have provided guidance to the Virginia legislature. The FBI defines Domestic Terrorism as: "[T]he unlawful use, or threatened use, of force or violence by a group or individual based and operating entirely within the [state] or its territories without foreign direction committed against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, *in furtherance of political or social objectives*." Comment, Noteboom, Aaron J. "Terrorism: I Know it When I See It", 81 Or. L. Rev. 553, 559 (Summer 2002) citing Fed. Bureau of Investigation-Counterterrorism Threat Assessment and Warning Unit Counterterrorism Div., Terrorism in the United States 1999: 30 years of Terrorism a Special Retrospective Edition.
http://www.fbi.gov/publications/terror/terror99.pdf.

deny that the category of "acts of terrorism" is narrowed by the definition of "weapons of terrorism", especially in light of what is known and what has been stated about the reasons the legislation was passed, when it was passed, and the surprise among those responsible to see it applied in the instant case.

CONCLUSION

The Terrorism Statute is as yet untested, and a case for which it was intended has thankfully not arisen. The instant matter, however, rather than being a case for which this statute was designed, is a case which illustrates the vague and overbroad nature of the terms on which the statute relies to determine life or death. The internal justification for execution of principles in the second degree are not accompanied by the same clear expression of intent to kill and "but for" causation of the "P2" found in "murder for hire" or at the direction of one engaged in a continuing criminal enterprise. In fact, the accessory under this statute may share only a particular allegiance or political belief with the principal, and thereby be eligible for execution. Likewise, the accessory *may not* share the same views – an essential element of the offense – and *still* be executed, based on some apparent theory of transferred motive from P1 to P2.

The distinction between two murders based purely on the motivation behind them, the symbolism intended, brings into question this statute's respect for the First Amendment, and while it has been held that the intent to intimidate can make a difference, it has *not* been held that it can or should be the difference between life and death. This is not surprising given our birthright as Americans – the absolute right to disagree with our government generally, or any or all of its policies, and to express such disagreement without fear that the *thought or expression itself* will be punished. Method of expression is a different issue, but that is *not* what subjects

one to death under § 18.2-31(13), which, upon its face, would have seen a great number of our founding fathers hanging from the gallows.

More practically, with the dearth of undefined terms and unanswered questions this statute creates, to punish one to the death penalty based upon the terms thereof would *per se* be cruel and unusual. However, to punish an accessory to such an offense is disproportionate to the defendant's culpability, as well as to the severity of his or her actions, and to punish such a person differently than those committing similar or even more heinous acts based purely on motivation is disproportionate to the actual offense. In that, the statute violates the Eighth Amendment to the United States Constitution and its parallel provisions of the Virginia Constitution.

WHEREFORE, Defendant respectfully prays that this Honorable Court will dismiss the indictment under Va. Code § 18.2-31(13).

Respectfully Submitted,

Lee Boyd Malvo
By Counsel

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CERTIFICATE OF SERVICE

We/I hereby certify that a true copy of the foregoing Motion/Memorandum was hand-delivered to:

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and the original was forwarded for filing to:

Hon. John T. Frey
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and a true copy was forwarded to the

Hon. Jane Marum Roush
Judge
Fairfax County Circuit Court
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this 8th day of October, 2003.

_____
Co-Counsel